United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7301

To be argued by
BARTLETT H. McGUIRE

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-7301

LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION,

Plaintiffs-Appellants,

—against—

NORMAN BIRENBAUM,

Defendant-Appellee,

—and—

DAVID BIRENBAUM, INTERNATIONAL DAVID, S.A.
and LYDIA, S.A.,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Statement of Prior Proceedings

This diversity action was commenced against the defendant-appellee Norman Birenbaum by service of a summons

and complaint upon him in Haverhill, Massachusetts on February 15, 1974. Plaintiffs-appellants are Lehigh Valley Industries, Inc. ("Lehigh") and its subsidiary, Lehigh Colonial Corporation ("Colonial") (A5).* They bring this action as successors in interest to the claims of Colonial Shoe Ornament, Inc. ("Ornament"), a Massachusetts corporation with its principal place of business in Massachusetts (A7, 8).**

On April 1, 1974 Norman moved under Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint as to him for lack of personal jurisdiction (A53). The Court granted the motion by memorandum and order dated January 29, 1975, ruling that Norman was not subject to jurisdiction under New York CPLR § 302 (A72-94). By order dated May 2, 1975 judgment was made final and plaintiffs took an appeal by notice of motion dated May 19, 1975 (A102, 103).

Statement of the Issues

1. Whether plaintiffs' affidavit established that Norman transacted business in New York, within the meaning

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* References to (A) are to pages in the Joint Appendix on Appeal.

** The other defendants are David Birenbaum, Norman's brother, International David, S.A. ("International") and Lydia, S.A. ("Lydia"), two Spanish corporations controlled by David.

of CPLR § 302(a)(1), through the activities of his brother as his purported agent in New York, or through his own alleged activities in New York.

2. Whether plaintiffs' affidavit established, for purposes of CPLR § 302(a)(2), that Norman committed a tortious act in New York by making false statements, although that affidavit made no mention whatsoever of any statements by Norman - whether true or false, whether made inside New York or outside.

3. Whether plaintiffs' affidavit established that Norman was subject to jurisdiction under CPLR § 302(a)(3)(ii), although the company alleged to have been directly injured by his conduct was a Massachusetts corporation with its sole place of business within Massachusetts, and although Norman individually derived no income from interstate commerce.

4. Whether plaintiffs should be permitted discovery on this motion in view of their complete failure to explain, in their affidavit opposing the motion, why they were unable to present therein the facts justifying their opposition.

The Allegations of the Complaint

The complaint contains nine causes of action (A5-17). Its principal thrust is against David Birenbaum,

Norman's brother (A73). It includes allegations that David served as a principal and/or agent of defendants International and Lydia at the same time that he was an officer of Ornament (A10-11); that he breached his employment contract with Ornament by failing to devote full time to Ornament (A9); that he improperly caused Ornament to purchase its entire supply of shoes from Lydia and thereby earned substantial profits at Ornament's expense (A11, 12); that he caused Ornament to pay Lydia the full invoice price for shoes the defective nature of which he covered up by fraud (A11, 12); that he abused his expense account and caused the disappearance of certain property of Ornament (A9, 10); and that he breached his termination agreement with Ornament (A16).

The District Court found that the claims against Norman are almost entirely derivative of the claims against his brother David (A73). Thus, plaintiffs allege that Norman failed to take action to correct David's allegedly wasteful behavior (A13), and that Norman aided and abetted David in his wrongful acts (A14), but they specify no act committed by Norman in aid of David. Plaintiffs also claim that Norman conspired with David to divert and appropriate the assets and business opportunities of Ornament (A8, 15), but they specify no act that Norman performed in furtherance of any such conspiracy.

The only claim against Norman which is not expressly related to David's conduct is a claim that "defendants" failed to devote their full time to Ornament's business (A9). While plaintiffs allege as a basis for this claim against David that he worked for his two Spanish companies (A9), there is no allegation that Norman was engaged in any way in any other business. Norman's affidavit submitted in support of the motion in the District Court states flatly that he worked only for Ornament during the time of his employment there (A54).

The Facts of Record Relating to the Jurisdictional Issues

1. Norman's Affidavit

In his affidavit in support of the motion to dismiss, Norman Birenbaum took great pains to set forth all of his contacts with New York, no matter how insignificant. These jurisdictional facts are essentially uncontested.

Norman is not presently transacting any business in New York. He has not since October 18, 1968 had any real or personal property in New York. He does not have and has not had an office in New York, and he does not solicit and has not solicited business in New York. He has not contracted and is not now contracting to supply

services or things into New York. He does not have and has not had a bank account, address or telephone listing in New York. He has never been engaged in litigation in New York, except for the present action (A55-56).

In 1968 David, Norman and two additional shareholders transferred their controlling stock in seven Massachusetts corporations, including Ornament, to Colonial. The sale of stock was effected by a Reorganization Agreement between the four sellers and Colonial (A18-31). Norman signed this agreement in New York on July 19, 1968 (A56). The exchange of stock and transfer of control were effected on October 18, 1968 (A54, 55).

On October 18, 1968 David and Norman entered into employment agreements with Ornament to serve as its President and Vice-President, respectively (A40-49, 54). The employment contracts (both of which are paginated H-1 through H-5) were identical form contracts between "CORPORATION" and "EMPLOYEE", the employees' names being typed in with a different typewriter from the one used for the body of the contract (A40-49). Other than the names and addresses, the only additions to the form contract were the salary and the term of years -- $60,000 per year and five years in both instances (A40, 45). Norman signed his employment contract in Massachusetts (A56, 57).

Some time after the transfer of the stock pursuant to the Reorganization Agreement, a dispute arose among the parties concerning the registration provisions of the Reorganization Agreement (A28-30, 56, 57). All four former Ornament shareholders brought suit in Massachusetts against Colonial seeking, inter alia, damages for breach of the registration provisions of the Reorganization Agreement (A57). By a settlement agreement entered into as of March 6, 1972, the parties ended this litigation and plaintiffs and Ornament released Norman and David from any and all claims, liabilities or rights of action arising out of events prior to that date (A58, 60-64). In connection with negotiations leading to the settlement agreement, Norman made trips to New York on March 26, 1970, February 22, 1972 and March 2, 1972 (A56).

Norman has not since October 18, 1968 engaged as an individual in any business; his sole employment was with Ornament from October 18, 1968 to June 29, 1973; and with Louran Corporation ("Louran") from July 1973 to the present time (A55). At all times during the course of Norman's employment at Ornament, that corporation had offices only in Haverhill, Massachusetts (A54).

In his capacity as an executive of Ornament, Norman made trips to New York approximately once a year for

the purpose of attending shoe shows (A56). At these shows he made agreements to sell products on behalf of Ornament. He conducted no business as an individual on these trips (A56-57). In December 1972, in his capacity as an executive of Ornament, Norman attended a Christmas party at the executive offices of Lehigh. He did not conduct any business as an individual on this trip (A57). During the period Norman was employed by Ornament he received no monies as compensation or otherwise from David or David's companies, Lydia and International, and he has no understanding that he will ever receive any monies from any of them (A55).

Since July 1973, after termination of his employment with Ornament, Norman has been president, treasurer and sole stockholder of Louran, a Massachusetts corporation with its sole place of business in Haverhill, Massachusetts (A55). Louran is engaged in the leather and imitation leather stripping business (A55). In his capacity as president of Louran, Norman visited New York on one occasion in February 1974 to attend a shoe show (A57). Except for this single occasion, Louran does not solicit and has never solicited business of any kind in New York. Louran does not contract and has never contracted in New York to sell services or things, and it does not contract and has never contracted elsewhere to supply services or things into New York. It

does not have and has never had an agent authorized to perform acts in New York on its behalf (A 57).

2. Tardiff's Affidavit

In opposition to Norman's motion to dismiss, plaintiffs submitted the affidavit of the controller of Lehigh, James W. Tardiff (A65-71). Mr. Tardiff stated that after the execution of the Reorganization Agreement in 1968, Lehigh treated Ornament as a department or division. Lehigh directed Ornament's activities through the vehicle of executive committees surpervised by Lehigh's executives. The direction provided by Lehigh executives consisted of, for example, budget approvals, planning decisions and the appointment of staff employees; exercising complete control over the cash resources of Ornament; and supervising and directing the entire financial reporting system of Ornament by establishing with particularity the contents of all of its financial reports (A65-66).

The rest of the facts set forth in the Tardiff affidavit concerning the employment agreement between Norman and Ornament were based on Mr. Tardiff's review of Lehigh's files and consultation with its employees (A66), and thus were made without personal knowledge. On the basis of his review, Mr. Tardiff stated that after the

execution of the Reorganization Agreement David Birenbaum conducted extensive negotiations over his employment contract with Ornament and over a separate employment agreement for his brother Norman. According to Mr. Tardiff, Norman did not participate in the negotiations; however, he accepted the agreement negotiated on his behalf by David, by executing it on October 18, 1968. In connection with the negotiation of these two employment agreements, David was present in New York and visited plaintiffs' offices on many occasions between July and October, 1968 (A66-67).

With respect to the settlement agreement entered into as of March 6, 1972, Mr. Tardiff asserted that it "reaffirmed the terms and conditions of Norman's employment contract with Ornament" (A67-68).

Mr. Tardiff further asserted that in the summer of 1972, David on behalf of himself and Norman began urging Lehigh to end Ornament's involvement in the leather stripping business; this position was stated to Lehigh's officers in New York. The matter was discussed with Norman and David being present at a Christmas party in New York during December, 1972 (A68). As a result of these urgings, Lehigh caused Ornament to gradually reduce its involvement in the leather stripping business, which was allowed to wind down. On June 18, 1973, what was left of the business was sold

to another company. At all times, according to Mr. Tardiff, Norman was aware of these facts (A68).

On the basis of his review of plaintiffs' files and conversations with plaintiffs' employees, Mr. Tardiff further stated that although the December occasion was styled a party, its primary purpose was to discuss the business prospects of all the Lehigh subsidiaries and divisions. A central topic of discussion during that period was the future of Ornament's continued involvement in the leather stripping business (A70). With Norman and David participating personally, it was determined that Lehigh would put the leather stripping business up for sale and continue to phase down operations until ultimate sale (A70).

With respect to Norman's interest in Louran, Mr. Tardiff stated that less than one month after Lehigh's sale of the leather stripping business, Louran began shipments to a shoe company in Massachusetts. Mr. Tardiff stated that to have commenced shipments at that time, Norman must have been engaged in his own leather stripping business well before the termination of his employment contract with Ornament (A69-70).

Finally, Mr. Tardiff stated upon information and belief that Norman derives substantial revenues from his leather stripping business from interstate commerce, since

two of his customers are New Hampshire shoe manufacturers (A70).

The Applicable Law

Plaintiffs' claim that the trial court has personal jurisdiction over Norman Birenbaum is based upon seven separate points, under each of the three subsections of New York's long-arm statute, CPLR § 302, which reads in relevant part as follows:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . . ."

On this motion to dismiss for lack of personal jurisdiction, plaintiffs bear the burden of proving that one or more of the provisions of CPLR § 302 is applicable. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Unicon Mgt. Corp. v. Koppers Co., 250 F. Supp. 850, 852 (S.D.N.Y. 1966). In order to sustain their burden of proof plaintiffs must demonstrate, by affidavit based upon personal knowledge, specific facts sufficient to sustain all jurisdictional elements. Plaintiffs cannot rely on the allegations of their complaint. See discussion of Fed. R. Civ. P. 56(e) and (f), pp. 36-37, infra.

ARGUMENT

POINT I

NORMAN DID NOT TRANSACT BUSINESS IN NEW YORK, EITHER THROUGH DAVID AS PURPORTED AGENT OR THROUGH HIS OWN ACTIVITIES, WITHIN THE MEANING OF CPLR § 302(a)(1)

1. Plaintiffs have not established that David was Norman's agent

In order to obtain personal jurisdiction over Norman under CPLR § 302(a)(1), plaintiffs must show that Norman, personally or through an agent, transacted business in New York; and that the cause of action arose out of that transaction of business. Plaintiffs have failed to accomplish either objective.

Plaintiffs' major contention under CPLR § 302(a)(1) is that David was Norman's agent, that in 1968 David negotiated the Reorganization Agreement on behalf of himself and all stockholders of Ornament, that he also negotiated Norman's and his own employment contract, and that these negotiations by David, as Norman's agent, constituted the transaction of business in New York by Norman.

In support of this argument plaintiffs rely on the statements in the Tardiff affidavit that, after the execution of the Reorganization Agreement in July of 1968, David visited New York to negotiate the terms of his own and Norman's separate employment contracts, and that he came to

New York in 1973 to negotiate over their resignations.

To establish agency under CPLR § 302(a), plaintiffs must set forth specific facts which spell out "a traditional common-law agency relationship"; i.e., that the purported agent was acting in New York at the request of the principal, on behalf of the principal, and subject to his control. See Marsh v. Kitchen, 480 F.2d 1270, 1273 (2d Cir. 1973) (Timbers, J.); Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256, 1261-62 (S.D.N.Y. 1970), modified on other grounds, 468 F.2d 1326 (2d Cir. 1972).

In the present case, plaintiffs' affidavit did not even assert that David was Norman's agent, although the "bland assertion" of such agency would not in any event be sufficient to establish an agency relationship for purposes of a motion to dismiss for want of personal jurisdiction. Unicon Mgt. Corp. v. Koppers Co., supra, 250 F. Supp. 850, 852 (S.D.N.Y. 1966). Nor did the affidavit assert that David's conduct was undertaken at Norman's request and for Norman's benefit -- assertions which have likewise been held insufficient in the absence of supporting facts. Id. at 851-52.* Nor did plaintiffs' affidavit assert any underlying facts which would establish that an agency relationship existed.

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* The strongest assertion was that "David also negotiated a separate employment agreement for his brother Norman Birenbaum" (A67).

The inadequacy of plaintiffs' affidavit is compounded by the fact that it was not made on personal knowledge. By contrast, Norman flatly stated, based on personal knowledge, that "I do not have and have not had any agent authorized to perform any acts in New York on my behalf" (A56). On jurisdictional motions, such affidavits based on personal knowledge are to be credited over contradictory allegations based merely upon information and belief or upon the impressions which plaintiffs' officers may have received from the defendant. Leasco Data Processing Equip. Corp. v. Maxwell, supra, 319 F. Supp. at 1260, 1262.

In summary, plaintiffs' affidavit is completely inadequate to establish agency. The affidavits in Unicon were stronger than the single affidavit submitted by plaintiffs here. Nevertheless, in Unicon the trial court dismissed for want of personal jurisdiction. The same result should obtain here.*

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* Plaintiffs have argued that even if no agency relationship existed between David and Norman, Norman's signing the contract which David brought to him from plaintiffs' office "ratified" David's actions in New York and retroactively created an agency relationship. Plaintiffs are incorrect in their assertion that ratification requires only a showing that "in accepting the benefits the principal had knowledge of the material facts and circumstances and that he acted in light of such knowledge" (Pl. Br. 28). There must also be proof that the unauthorized agent purported to act for the principal, Restatement (Second) of Agency § 85 (1957), and proof that the agent made an unauthorized commitment on behalf of the principal, id. § 82. Neither of these factors is established or referred to in this case.

2. David's contacts with New York, purportedly made on Norman's behalf, were insufficient to constitute the transaction of business here

Judge Stewart found that "plaintiffs have not shown that David did anything more than 'negotiate' an identical form contract for him and for Norman when he was in New York" (A 78). Therefore, even if David had been Norman's agent in New York in connection with negotiating the employment contracts, his contacts on behalf of Norman would not satisfy CPLR § 302(a)(1), and Judge Stewart so held (A80). See Galgay v. Bulletin Co., 504 F.2d 1062 (2d Cir. 1974); Franklin National Bank v. Krakow, 295 F. Supp. 910 (D.D.C. 1969); Friedr. Zoellner (New York) Corp. v. Tex Metals Co., 278 F. Supp. 52 (S.D.N.Y. 1967), aff'd, 396 F.2d 300 (2d Cir. 1968); McKee Electric Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967); Standard Wine & Liquor Co. v. Bombay Spirits Co., 25 A.D.2d 236, 268 N.Y.S.2d 602 (1st Dep't 1966), aff'd, 20 N.Y.2d 3, 228 N.E.2d 367, 281 N.Y.S.2d 299 (1967).

In Standard Wine and Liquor Co. v. Bombay Spirits Co., supra, a New York retailer sought to bring an action for breach of contract against a British manufacturer (Bombay) and against a corporation (Penrose) which had the exclusive privilege of selling Bombay's products in the United States.

The contract was negotiated in New York between attorneys for plaintiff and Penrose. It was then sent to England where Bombay signed it, and returned to New York, where plaintiff executed it. Pursuant to that contract, Bombay's products were put into commerce in New York. The Appellate Division and the Court of Appeals, after reviewing the alleged contacts which Bombay had with New York, both concluded that they were insufficient to constitute the transaction of business.

Plaintiffs do not contest the trial court's finding that David did nothing more than negotiate identical form contracts for him and for Norman when he was in New York. Nor do they assert that such minimal contact is sufficient to subject Norman to jurisdiction in New York.

Rather they assert that David's activities in negotiating the Reorganization Agreement, involving the sale of Ornament to Colonial, were activities undertaken in New York on Norman's behalf, and that their claims under Norman's employment contract arise out of such activities (Pl. Br. 21-22). The assertion is unsupported by the Tardiff affidavit, which refers only to David's purported negotiation of the employment agreement "[a]fter the execution in July 1968 of the contract between Lehigh and the Birenbaums to purchase Ornament and six other corporations"

(A66-67). The affidavit does not even refer to the negotiation of the Reorganization Agreement, much less to David's negotiating it in New York as agent for Norman.

Further, there are no allegations in the complaint that Norman or any other defendant breached the Reorganization Agreement. The allegations are that Norman breached an employment agreement which he signed in Massachusetts and which was to be performed in Massachusetts.

Thus, any contacts in New York which related to the Reorganization Agreement would not support jurisdiction over a claim arising out of the employment agreement. It may be that the employment agreement could not have occurred without the sale, which was the subject of the Reorganization Agreement. However, the fact that one occurrence is a prerequisite to another does not establish that the two are so linked that contact with respect to one may be used to establish jurisdiction with respect to a claim arising out of the other. See Fontanetta v. American Bd. of Int. Med., 421 F.2d 355, 358 (2d Cir. 1970).

The only reported decision cited by plaintiffs in support of their argument on this point is Security National Bank v. Republic National Life Insurance Co., 364 F. Supp. 585 (S.D.N.Y. 1973). In Security National Bank the contract with respect to which defendant was being sued had

been executed by defendant in New York. The Court pointed out that under New York law the signing of the contract in New York was sufficient to give New York courts personal jurisdiction over defendant. The Court also noted that the defendant negotiated seriously with respect to the contract on two separate occasions in New York. In the present case, by contrast, the employment agreement was signed in Massachusetts and the District Court found that there were not sufficiently serious negotiations in New York to establish jurisdiction.

In Security National Bank, however, the Court also noted that a similar and related contract had been negotiated and consummated in New York. Despite this statement, upon which plaintiffs rely, the Court's holding was squarely based on the fact that the contract at issue was signed and on two occasions negotiated in New York. 364 F. Supp. at 589.

In the unreported decision relied on by plaintiffs, National Bank of North America v. Bennett, 71 Civ. 2021 (S.D.N.Y. May 23, 1974) (Lasker, J.) the contract at issue was entered into in order to obviate a problem that had developed in the negotiations of an earlier transaction -- which negotiations had taken place in New York. The new contract was merely a different way of structuring the same transaction. Further, the place of performance was New

York. These factors distinguish it from the case at bar.

The other cases cited by plaintiffs support neither the proposition that the supposed negotiations over the Reorganization Agreement may be used to find jurisdiction in this case nor the proposition that Norman may be subject to jurisdiction on the basis of the "negotiation" by an agent of a form contract identical in all respects to the agent's contract negotiated on behalf of himself. In Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 457, 209 N.E.2d 68, 75-76, 261 N.Y.S.2d 8, 19 (1965), cert. denied sub nom. Estwing Mfg. Co. v. Singer, 382 U.S. 905 (1965), the Court of Appeals upheld jurisdiction over a nonresident corporation only on the basis of:

> "* * * substantial preliminary negotiations through high-level personnel during a period of some two months; the actual execution of a supplementary contract; the shipment for use here, subject to acceptance following delivery, of two specially designed machines, priced at the not inconsiderable sum of $118,000; and the rendition of services over a period of some three months by two of the appellant's top engineers in supervising the installation and testing of the complex machines."

In Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 956 (2d Cir. 1967), the Court similarly upheld jurisdiction over a nonresident corporation on the following facts:

> "a high-level agent and officer of American Marine made three separate trips to New York

> over a period of two months to meet and negotiate with Liquid Carriers in connection with the contract involved in this suit. American Marine stood to derive considerable economic benefit from these excursions to New York. Because of the nature of the negotiations involving the complex technical problems of building a chemical-carrying barge, it is unlikely that the contract could have been negotiated otherwise than by such face-to-face meetings between the parties."

Under the facts as developed in this case neither the spirit nor the holding of Longines-Wittnauer or Liquid Carriers would apply.*

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* As to the other cases cited by appellants: In Thompson v. Ecological Science Corp., 421 F.2d 467, 468 (8th Cir. 1970), the defendant was a corporation whose agents had negotiated the terms of a new contract "related to the organization, financing and operation of a new corporation . . . ." Id. at 468. Such negotiations were perforce considerably more substantial than those at issue here, and took two full days. In Benedict Corp. v. Epstein, 47 Misc. 2d. 316, 262 N.Y.S.2d 726 (Sup. Ct. Albany Co. 1965) the defendant had agreed that the place of performance of the contract at issue was New York. The reasoning of the Court is not applicable to the case at bar where the place of performance was Massachusetts and the default, if any, took place in Massachusetts. In Strasser, Spiegelberg, Fried & Frank v. Schlesinger, 53 Misc. 2d 78, 278 N.Y.S.2d 427 (Sup. Ct. N.Y. Co. 1967) the court found that the plaintiff law firm had been engaged by the defendant's wife in New York at his behest and further, his New York attorneys had "engaged in extensive negotiations with plaintiffs in New York." The only case cited by plaintiffs which might conceivably support the contention that the simple negotiation of a form contract is sufficient is Harry Winston, Inc. v. Waldfogel, 292 F. Supp. 473 (S.D.N.Y. 1968). It is submitted that to the extent that Waldfogel might support such a proposition the court stretched CPLR § 302(a)(1) beyond its permissible limits. Further, Waldfogel did not involve, as the present case does, a long-term contract with a locus of activities outside New York.

Finally, it should be noted that, pursuant to the settlement agreement, plaintiffs released Norman from all claims, liabilities or rights of action arising out of events prior to March 6, 1972 (A58). The purported contacts relating to the Reorganization Agreement took place prior to that date. It would be anomalous for a court to take jurisdiction over Norman because of events taking place prior to the date of the release, when those same events could not give rise to any liability whatsoever.

3. Norman did not personally transact business in New York, within the meaning of CPLR § 302(a)(1)

Although David's activities provide the principal basis for plaintiff's assertion of jurisdiction under CPLR § 302(a)(1), Norman's activities are mentioned in three places. First, plaintiffs urge that Norman's signing of the Reorganization Agreement in New York, in 1968, was the transaction of business out of which their claims relating to the employment agreement arose (Pl. Br. 25). Second, they urge that Norman negotiated and signed the settlement agreement in New York in 1972, that the settlement agreement ratified the employment agreement, and that the claims arising out of the employment agreement therefore arose out of the settlement agreement as well (Pl. Br. 29-30). Third,

they contend that during four trips to New York on Ornament's business, Norman encouraged Lehigh to abandon the leather stripping business and took various steps to start up the business of Louran, all in violation of his fiduciary duty to Ornament (Pl. Br. 37-39).

Virtually all of these purported contacts, like the contacts of David discussed above, took place prior to or in connection with the signing of the settlement agreement and the release included therein, and thus should provide no basis for the assertion of jurisdiction over Norman.

Norman's single contact in signing the Reorganization Agreement in New York is so insubstantial that it is not the subject of any of plaintiffs' eight questions presented for appeal, and was not briefed below.

Plaintiffs' contention regarding the settlement agreement apparently arises from the following language therein, which limits the broad and unconditional language of the release discussed at page 23 above:

> "The foregoing release shall neither limit nor impair the rights of the parties under the employment agreements between [Ornament] and Norman Birenbaum and David Birenbaum dated October 18, 1968 accruing from and after this date." (A58.)

This limiting clause simply recognized the existence of the preexisting employment agreements and

disavowed any intent to impair the rights of the parties under those agreements. Far from ratifying or reaffirming the employment agreements, the limiting clause specifically disassociated the settlement agreement from them.

This analysis is further supported by the fact that plaintiffs did not sue for breach of the 1972 settlement agreement, but rather for breach of the employment contract dated October 18, 1968.

Finally, with respect to Norman's purported encouragement of Lehigh to abandon its leather stripping business and his purported steps to start up the business of Louran: plaintiffs contend that the urgings took place during Norman's yearly business trips on behalf of Ornament. Plaintiffs concede that an individual's transaction of business in New York solely as a corporate officer does not create personal jurisdiction over the individual, but contend that Norman's alleged activities with respect to the leather stripping business violated his fiduciary duties. The allegation finds no support in the Tardiff affidavit, which referred only to urgings by David and not to any urgings or statements of any kind by Norman (A68). The affidavit did state, upon information and belief, that Norman must have been engaged in his own leather stripping business well before the termination of his employment contract

with Ornament (A69-70), but it did not suggest that such conduct took place in New York.

In short, there is no substance to the contention that plaintiffs' claims arose out of the transaction by Norman of business in New York.

POINT II

NORMAN DID NOT COMMIT ANY TORTIOUS ACTS IN NEW YORK, WITHIN THE MEANING OF CPLR § 302(a)(2)

In order to satisfy the requirements of CPLR § 302(a)(2), plaintiffs must demonstrate that Norman committed a tortious act within New York. Plaintiffs attempt to satisfy this requirement by contending that in furtherance of the tortious taking of Ornament's leather stripping business, Norman sent false and misleading statements to plaintiffs in New York, which plaintiffs relied upon in deciding to discontinue Ornament's leather stripping operations.

As pointed out in the previous section, the Tardiff affidavit did not refer to any communications - whether made in New York or elsewhere - from Norman to Lehigh regarding the leather stripping business.

Even if Mr. Tardiff had sworn that Norman sent such communications from Massachusetts, Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966), holds definitively that such out-of-state action would not constitute the commission of a tort within the state, under the provisions of CPLR § 302(a)(2). Accord, Gluck v. Fasig Tipton Co., 63 Misc.2d 82, 310 N.Y.S.2d 809 (Sup. Ct. N.Y. Co. 1970).

Plaintiffs also contend, for the first time in this Court, that Norman is subject to jurisdiction because he committed a tort while physically present in New York. This contention is based upon Norman's trip to New York for an Ornament Christmas party in December 1972, and upon alleged misrepresentations made by Norman at that party regarding the leather stripping business. But Mr. Tardiff carefully avoided saying anywhere in his affidavit that Norman or David had made any misrepresentations. As noted above, he did not even refer to any communications by Norman on this subject. There is no basis in the record for plaintiffs' assertion of jurisdiction under CPLR § 302(a)(2).

POINT III

PLAINTIFFS' ASSERTION OF JURISDICTION UNDER CPLR § 302(a)(3)(ii) MUST FAIL BECAUSE NO DIRECT INJURY WAS SUFFERED FROM ANY ALLEGED TORTS IN NEW YORK AND BECAUSE NORMAN DERIVES NO INCOME FROM INTERSTATE COMMERCE

1. The Tort Claims

In order to sustain jurisdiction under CPLR § 302(a)(3)(ii), plaintiffs must demonstrate that a tortious act was committed outside the state which caused injury to persons or property within the state, and that Norman "derive[d] substantial revenue from interstate or international commerce." The District Court held that "plaintiffs have failed to show the necessary elements" (A83).

If Norman's conduct injured any corporation in this case, it was Colonial - a Massachusetts corporation. Plaintiffs attempt to avoid this basic point by urging that, "[r]ealistically viewed," the injury was in fact suffered by plaintiffs because Ornament was owned by Colonial which in turn was owned by Lehigh (A40-41).

The law is to the contrary. The required injury in New York must be direct and not "remote or consequential injuries which occur in New York only because the plaintiff is domiciled, incorporated or doing business in the state." Friedr. Zoellner (New York) Corp. v. Tex Metals

Co., 396 F.2d 300, 303 (2d Cir. 1968). There, the Court held that injury to a joint venture in Texas could not be considered an injury within New York State, even though the joint venture's parent would suffer financial loss. See also American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2d Cir. 1971); Gildenhorn v. Lum's Inc., 335 F. Supp. 329, 335 (S.D.N.Y. 1971), rev'd on other grounds sub nom. Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973), vacated on other grounds, 416 U.S. 386 (1974).

Apparently in order to avoid the effect of these cases, plaintiffs urge this Court to disregard their corporate structure as a "legal fiction", to pierce their corporate veils and to treat the injury to Ornament as if it were injury to Lehigh (Pl. Br. 42), because Lehigh in fact treated Ornament as a division (A66). Plaintiffs present no adequate basis for ignoring the existence of Ornament as a separately incorporated entity. It is clear that Lehigh did not consider the officers of Ornament - whom they are suing in this case - to have been officers of Colonial or Lehigh. Further, it is inappropriate for plaintiffs to argue that Ornament was actually operated by Lehigh, since they allege in this suit that, presumably unbeknownst to Lehigh, the operating officers of Ornament

milked the subsidiary (A8, 12, 13). Finally, they do not argue that Ornament was used for fraudulent purposes by its parent. See Bartle v. Home Owners Cooperative, Inc., 309 N.Y. 103, 106-07, 127 N.E.2d 832, 833 (1955).*

Even assuming that the separate existence of Ornament should be ignored, American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971), holds that the situs of injury relating to tortious activity against a national corporation is the state where the loss of business actually took place. In American Eutectic the plaintiff corporations alleged that the defendant, a non-resident corporation, had stolen salesmen directly from their sales forces in two states outside of New York. Plaintiffs asserted jurisdiction in New York on the ground that they were both New York corporations and therefore suffered injury in New York. The Court, per Judge Feinberg, rejected that argument, pointing out that:

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* Plaintiffs' effort to pierce the corporate veil is even more heroic than it appears at first sight, since Ornament was a subsidiary of Colonial which was in turn a subsidiary of Lehigh, the corporation which allegedly treated Ornament as a division (A5, 7; Pl. Br. 41). Thus, plaintiffs apparently seek at one time to pierce two corporate veils within their own organization.

". . . the places where plaintiff 'lost business' were all out of New York.

Of course, there is no question that plaintiffs suffered some harm in New York in the sense that any sale lost anywhere in the United States affects their profits. But that sort of derivative commercial injury in the state is only the result of plaintiffs' domicile here." 439 F.2d at 433.

The Court also discussed the case primarily relied upon by plaintiffs, General Motors Acceptance Corp. v. Richardson, 59 Misc.2d 744, 300 N.Y.S.2d 757 (Sup. Ct. Monroe Co. 1969), as follows:

"In criticism of that decision, it has been pointed out that such an assumption would be

that if the plaintiff is in New York when the injury occurs, the injury must occur in this state. The potential of so sweeping a doctrine is enormous, and it is suggested, in many cases would violate due process.

J. McLaughlin, Supplementary Practice Commentary, CPLR § 302, at 123 (McKinney Supp. 1970)." 439 F.2d at 434.

CPLR § 302(a)(3) also requires that plaintiffs show that Norman derived substantial revenues from interstate commerce. Plaintiffs do not contend that Norman personally derives substantial revenues from interstate commerce. However, they argue that the revenues of Louran may be attributed to Norman (Pl. Br. 45-46). With respect to Norman's purported transaction of business

through Louran, the New York Court of Appeals recently rejected a similar attempt to obtain jurisdiction over an individual defendant by attributing to him the acts of a corporation which he controlled. In Ferrante Equip. Co. v. Lasker-Goldman Corp., 26 N.Y.2d 280, 283, 258 N.E.2d 202, 204, 309 N.Y.S.2d 913, 916 (1970), the court held:

> "The mere fact that respondent is a controlling shareholder in the Ferrante Equipment Company, a corporation concededly doing business in New York . . ., will not subject respondent, as an individual, to in personam jurisdiction under the long-arm statute unless the record would justify our piercing the corporate veil. Since there has been no such showing, we must assume that the corporation was a separate and independent entity; and for that reason, only the acts of respondent, as an individual, may be considered in determining whether enough has been shown to sustain jurisdiction." (Emphasis added.)

In Bartle v. Home Owners Cooperative, Inc., 309 N.Y. 103, 106-07, 127 N.E.2d 832, 833 (1955), the Court of Appeals held that sole ownership and control of a corporation's affairs did not justify piercing the corporate veil:

> "The law permits the incorporation of a business for the very purpose of escaping personal liability [citations omitted]. Generally speaking, the doctrine of 'piercing the corporate veil' is invoked 'to prevent fraud or to achieve equity' [citations omitted]. But in the instant case there has been neither fraud, misrepresentation nor illegality."

Plaintiffs neverthelss argue that this Court should pierce the corporate veil of Louran because Louran is the

"vehicle" for the misappropriation of the leather stripping business (Pl. Br. 46). No authority is given by plaintiffs for so ignoring the corporate existence of Louran. Plaintiffs do not allege that Norman misled or defrauded them through the mechanism of a sham corporation. There is no evidence that Louran is a sham corporation. There is no evidence that plaintiffs have ever had any dealings with Louran in any way. There is no evidence that Norman had disregarded the corporate form. There is no reason or basis for piercing the corporate veil.

2. The Conspiracy Claims

Plaintiffs allege that David engaged in conduct which diverted assets and business opportunities of Ornament. The alleged wrongful activities involved (a) causing Ornament to purchase its entire supply of shoes from Lydia with the result that David earned substantial profits at Ornament's expense; (b) causing Ornament to pay Lydia the full invoice price for shoes, the defective nature of which he covered up by fraud; (c) abusing his expense account and causing the disappearance of certain property of Ornament; and (d) breaching his employment and termination agreements with Ornament. Norman is alleged to be a co-conspirator in this misconduct.

Plaintiffs also allege that David and Norman conspired to misappropriate a corporate opportunity in that they urged Lehigh to end Ornament's involvement in the leather stripping business in order that Norman could commence a leather stripping business of his own.

Plaintiffs' affidavit failed even to make the broad assertion that a conspiracy existed. Nor did it indicate what might be the nature, scope or duration of any conspiracy. The affidavit provided even less basis, if that is possible, for the claim of conspiracy than for the claim of agency.

Further, as to the second alleged conspiracy, the plaintiffs' affidavit carefully avoided asserting that either Norman or David made any misrepresentations or took any fraudulent action that caused Lehigh to terminate Ornament's involvement in the leather stripping business. In fact, as noted above, the affidavit did not assert that Norman made any representations, true or false, in New York or elsewhere.

POINT IV

PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY ON THIS MOTION BECAUSE THEY HAVE NOT SHOWN BY AFFIDAVIT WHY THEY NEEDED SUCH DISCOVERY

A motion to dismiss for lack of personal jurisdiction, supported by the affidavit of the moving party, is essentially a motion for summary judgment pursuant to Rule 56, and can be decided on the basis of the submitted affidavits without taking oral testimony or allowing further discovery. See 2A J. Moore, Federal Practice § 12.09[3] at 2298 and 2299 n.21 (2d ed. 1975).

Pursuant to Rule 56(e) the plaintiffs are required to respond by affidavit setting forth, on personal knowledge, specific facts which would be admissible in evidence. See 6 J. Moore, Federal Practice ¶ 56.22[1] at 2803 (2d ed. 1975). This Court has consistently held that a party opposing a Rule 56 motion cannot rest on the allegations or denials of his pleadings, or expect an affidavit which merely repeats the conclusory allegations of the pleadings to defeat such a motion. See, e.g., Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2d Cir. 1968), affirming the district court's dismissal of a third-party claim on the basis of the affidavits submitted on the motion; Dressler v. MV Sandpiper,

331 F.2d 130 (2d Cir. 1964); Miller Studio, Inc. v. Pacific Import Co., 39 F.R.D. 62 (S.D.N.Y. 1965).

The conclusory allegations of the complaint herein were not supported by the Tardiff affidavit, which was in any event made almost entirely without personal knowledge; thus plaintiffs have failed to meet the requirement that they show "threshold jurisdiction". See United States v. Montreal Trust Co., 358 F.2d 239, 242 n.4 (2d Cir. 1966), cert. denied, 384 U.S. 919 (1966); Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256, 1261-1262 (S.D.N.Y. 1970), modified on other grounds, 468 F.2d 1326 (2d Cir. 1972); Unicon Mgt. Corp. v. Koppers Co., 250 F. Supp. 850, 852 (S.D.N.Y. 1966).

Under Rule 56(f), if the plaintiffs are not able to provide proof by affidavit sufficient to justify their opposition, they are required to show in their affidavit why they cannot do so. Rule 56(f) reads in pertinent part:

> ". . . Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In a recent decision in the Court of Appeals for the Eighth Circuit, Willmar Poultry Co. v. Morton-Norwich

Products, Inc., 1975-2 Trade Cas. ¶ 60,410 (8th Cir. 1975), plaintiffs claimed that defendant had engaged in an unlawful scheme to fix the prices of a drug developed by Norwich and marketed by Richardson-Merrell, Inc. Plaintiffs alleged that defendants had fraudulently concealed the price-fixing scheme, thereby tolling the statute of limitations. Defendants successfully moved for summary judgment on the ground that the claim was barred by the statute of limitations.

In opposition to the motions for summary judgment, plaintiffs had filed in the trial court affidavits requesting further discovery under Rule 56(f) on the following grounds:

> "2. At this time, plaintiff cannot present by affidavit facts essential to justify opposition to the motions of the defendants dated July 25, 1974.
>
> 3. Knowledge of such facts is exclusively with and/or largely under the control of the conspiratorial defendants.
>
> 4. Plaintiff has properly and timely commenced discovery designed to elicit such facts about conspiratorial activities with the filing of an extensive first set of Interrogatories served June 24, 1974.
>
> 5. Plaintiff is desirous of maintaining its discovery program of interrogatories, document inspection and depositions, which shall be conducted in prompt and orderly fashion to elicit facts from the alleged co-conspirators." 1975-2 Trade Cas. at p. 66,797.

After reviewing the conclusory affidavits, the Court of Appeals ruled that the plaintiffs had failed to establish any reason for postponement by the trial court of the ruling on the motion for summary judgment. In unequivocal language the court stated:

> "Plaintiffs made no effort to demonstrate what purpose, if any, discovery would accomplish, given the evidence proffered by the defendants on the absence of fraudulent concealment and the public character of the evidence supporting the applicability of the statute of limitations. While at the same time conceding that they knew of no evidence that would enable them to show the existence of a genuine issue of material fact, the plaintiffs made no attempt to identify what, if any, facts were within the defendants' exclusive control and how, if at all, discovery would assist them in bringing those facts to light." Ibid.

The court went on to state:

> "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified." Ibid.

In the present case the plaintiffs did not provide the District Court with any reason, much less sufficient reason, to delay the granting of Norman's motion and allow the taking of discovery with respect to any issue relating to personal jurisdiction. The Tardiff affidavit made no attempt to justify plaintiffs' diffident suggestion that they be allowed discovery in conjunction with the motion to dismiss. It did not point to any facts that plaintiffs might try to develop on discovery. It did not indicate why plaintiffs could not put such facts before the Court by affidavit; and it did not describe the efforts made to date to discover the needed facts.

In short, plaintiffs gave the District Court no basis for requiring Norman to undergo discovery and the District Court properly refused their suggestion that he do so.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court dismissing the complaint against defendant Norman Birenbaum should be affirmed.

Dated: New York, New York
October 10, 1975

Respectfully submitted,

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